Central Law Journal.

ST. LOUIS, MO., FEBRUARY 24, 1911.

THE CARMACK AMENDMENT AS A LAWFUL REGULATION UNDER THE COMMERCE CLAUSE, AND ITS LOGICAL POSSIBILITIES AS TO INTERSTATE RATES AND THE COMMON LAW DUTY OF A COMMON CARRIER.

The federal supreme court, speaking through Mr. Justice Lurton, confines itself to very narrow ground in its decision passing upon a challenge to the constitutionality of the "Carmack Amendment." Atlantic C. L. R. Co. v. Riverside Mills, 31 Sup. Ct. 164.

This amendment provides: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed." Then it is also provided that the initial carrier may recover from the carrier on whose line the loss or injury was sustained.

This latter provision seems to us quite immaterial upon the question of the constitutionality of the "Amendment," because, if the law does not guarantee, absolutely, reimbursement to the initial carrier the amount it becomes liable to pay for the default of a connecting carrier, the Amendment, if constitutional at all, would be constitutional independently of the right to sue for reimbursement. The taking of one's property without due process of law is as manifest in compelling the acceptance of a chose in action as a substitute for other property, as when nothing is offered in return for what is taken. Even an absolute guarantee of reimbursement might not be sufficient to compel one to yield what he has for something, though it be in specie, that he is to get.

It seems to us that the learned justice, who spoke for the court, also thought that this provision did not greatly aid the claim of constitutionality for the amendment, for after he first treats of constitutionality in a broad way, he says in effect, that all that is urged by the railroad as to denial of free right of contract and the taking of property without due process of law was not open for it to claim, because, the regulation being within the commerce clause, the railroad had voluntarily received freight which was lost by connecting carriers. Therefore the conclusive presumption, under the regulation, was that it agreed to pay in case of loss, damage or injury wheresoever happening in course of transportation. This part of the opinion seems too clear for any elaboration.

Nevertheless it was necessary for the general constitutionality of the regulation to be passed upon, as otherwise the exempting clause of the contract or bill of lading would be valid.

The facts of the case do not show, that the shipments, the loss of which by connecting carriers was sued for, were to an adjoining state only, but the inference is that they were not, and may even have been across, and to distant, states.

This remark is ventured, because it would seem directly within regulation under the commerce clause to say that a carrier could not accept freight to be delivered beyond the line of its state without being liable

for loss or damage or injury. The power to regulate is in the carrier's undertaking to transport freight across a state line. But it is not so clear that congress has the right to say, if two or more state lines are to be crossed that, after the first line is crossed, the original regulation attaches and successively to the destination in a distant state.

In other words, it seems easier to see that the connecting lines in the intial carrier's own state may be declared to be its agents in a design to make a shipment an interstate shipment, than that congress shall also have the power to declare that connecting carriers in what has become an interstate shipment shall also be its agents. The former situation is an enterprise in the entering into interstate traffic; the latter is attaching a condition to what *has* entered into such traffic.

But the evil congress found to exist was that in shipments in interstate transportation there was uncertainty as to where loss, damage or injury occurs when possession has been surrendered to the carrier, and this was a genuine obstruction to the free flow of the stream of interstate traffic, and the receiving carrier should be answerable for such loss, damage or injury.

In other words, congress said, as the amendment was interpreted, that, if a railroad routes goods to another state—no matter how many states may intervene—the initial carrier is responsible for loss, damage or injury at each and every point of the entire route to the point of delivery. In this aspect the shipment is interstate between the receiving and the ultimate state and for these two only is there commerce "among the states."

Stated this way, it seems somewhat clearer that the commerce clause attaches, and the regulation is as valid as between contiguous states. We do not see how it can be doubted but that congress has the right to declare that a carrier must agree to be responsible for loss, if it receives an article to be carried across one state line, and if over one, also another.

But this amendment does not, or, at least, the supreme court seems averse to saying that it does, declare, that a carrier must, when freight is offered to it for interstate carriage, accept it, upon any tender of any freight rate that may be prescribed for such carriage. Nor does the amendment declare that a carrier may not say it will carry the freight by itself and connecting carriers only to some point it may choose on the way to destination and no further.

As to these two questions, we quote from the opinion, as follows: "This record presents no question as to the right of the initial carrier to refuse a shipment designated for a point beyond its own line, nor its right to refuse to make a through route or joint rate when such route and rate would involve the continuance of a transportation over independent lines. We therefore refrain from any consideration of the large question thus suggested."

This question will, no doubt, be much pondered, not only in legal and transportation circles interested in railroad matters, but also in business circles generally, and the kaleidoscope in the railroad problem may yet present its necessary determination by the supreme court.

If it be true that an interstate shipment can be rejected, because a carrier may say it will not stand responsible for any loss beyond its own line, then it may select what connecting carriers it is willing to be responsible for, and shippers can give no binding directions as to a route.

It will be further true that delay in transportation cannot be based upon time consumed, ordinarily, on a direct or usual route between points, because a railroad, having the conclusive right to select its own connections, may send freight in any roundabout way it sees fit. And if it has the right to do this, why has it not the right to charge for every mile it is hauled?

Furthermore, if the initial carrier has the legal right to refuse freight beyond its terminus, why has it not the right to say it

will accept the responsibility of loss, damage and injury on its own and other lines for a consideration? If this consideration take the shape of a freight charge in addition to any rates that are prescribed, what is to prevent the validity of such a consideration?

The principle at common law is that a public service corporation is bound to give *its* service to the public when duly required and without discrimination, but there is no principle of which we are aware, that it is bound to enlist the services of other public service corporations and stand responsible for their defaults. It may be that it can be required that, if it does the latter, it shall not favor one part of the public over another, but why may it not charge for the burden it additionally assumes? If it may, has the federal government the right to say how much it shall charge, or that it shall charge nothing? It is not a charge strictly for transportation, but a charge for insuring freight to be transported by others —in other words, to avoid the evil in a particular case which congress has said, often or generally, exists in interstate shipments.

As we understand the "Amendment," it gives a carrier the right to refuse an interstate shipment if it desires so to do; but if it accepts it, it shall bind itself absolutely for any loss, damage or injury that happens, to it. This only is what the court has decided to be constitutional, no other question being involved. It may additionally be said, that the "Amendment" does not take into consideration the question whether or not a carrier is a common carrier. What regulations under the commerce clause deal with is transportation in interstate commerce—that is, transportation for which a fee or reward is charged in the carriage of freight from one state to another. If this is done by a private carrier and he engages with connecting private or public carriers to deliver an article at destination, so much more clearly does it seem, he may exact a consideration for what congress, on the theory of its legislation, deems of substantial benefit to consignors and consignees.

NOTES OF IMPORTANT DECISIONS

NEGLIGENCE—THE DEGREE OF CARE TO WHICH THE DOCTRINE OF RES IPSA LOQUITUR APPLIES.—The Supreme Court of Montana discusses very interestingly the question of liability of a railroad company to a passenger riding on a pass which exempted the carrier from negligence, where the only proof of negligence rested in the doctrine of res ipsa loquitur. Jones v. Northern Pac. Ry. Co., 111 Pac. 632.

The court ruled that where a carrier carried for reward it was bound to the utmost care under the statute, while the statute prescribed that a carrier of persons without reward must use ordinary care and diligence for their safe carriage. Then the court proceeds to declare, that a pass being a nullity because it is sold in contravention of law, the passenger was a mere licensee on the train and entitled from the carrier to the exercise on its part of ordinary care in his behalf, as a person carried without reward.

The accident in the case causing injury was derailment. There is citation of authority, wherein res ipsa loquitur constituted prima facie evidence of negligence sufficient if unexplained to authorize recovery, but it all related to passenger cases where the distinction drawn by the Montana statute as to passengers for and without reward is not drawn, or was declared not to exist. It is said, generally, in 3 Thompson on Negligence, Section 2770, in speaking of the presumption from the happening of an unexplained accident, that it shows the want of "due care," but this seems not to have been said in a discriminative way.

The Montana case is elaborate and besides a prior case in that state that derailment presumes the want of ordinary care cites only a North Carolina case which declares that: "This presumption (of negligence) extends to the occurrence, regardless of the party injured." Wright v. Railroad, 127 N. C. 235, 37 S. E. 221.

The federal supreme court in ignoring the distinction we speak of says: "When carriers undertake to convey persons by the powerful and dangerous agencies of steam, public policy and safety require that they should be held to the greatest possible care and diligence, and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents." Railroad v. Derby, 14 How. 486. We do not, therefore, get from this any general rule as to the application of the presumption in res ipsa loquitur to degrees of care. But the question was squarely presented under

Montana statute, and it was held that want of ordinary care was shown where res ipsa loquitur applies.

DYING DECLARATIONS—RELIGIOUS BELIEF AS A TEST OF ADMISSIBILITY IN EVIDENCE.—In State v. Yee Gueny, 112 Pac. 424, decided by Supreme Court of Oregon, it was held there was no error in refusing a requested instruction to the effect that the jury could take into consideration, as affecting his credibility, the fact, if established to its satisfaction, that the deceased did not believe in future rewards and punishments at the time of making his dying statement.

The court said: "Had deceased lived and taken the witness stand, this objection would not have been tenable, and, since dying declarations are admitted only on account of the exigencies of the occasion, so often discussed and so well understood, no reason exists in such a case for relying on any certain belief with reference to a future life, its rewards and punishments, any more than could be urged against a witness testifying in the presence of a jury. Every witness is presumed to speak the truth, and under the law, the statements of a person made with full knowledge of impending death are entitled to the same presumption. The natural inclination of every sane person is to speak the truth on all occasions; exception thereto existing only by reason of some motive therefor, testimony relative to dying declarations is admissible to show a motive for false statement; for example such circumstances and incidents surrounding the last statements as may indicate a spirit of revenge or otherwise * * * but a religious belief or want thereof or lack of confidence in future rewards or punishments, as the case may be, is not an adequate basis for that purpose."

There seems to us a sort of irrelevancy in this reasoning to the point involved. The objection was not to the competency of the dying declaration, but a cautionary instruction was asked in respect to its credibility. It has even, however, been held, that disbelief in future rewards and punishment does go to the competency of a dying declaration. Donnelly v. State, 26 N. J. L. (2 Dutch) 463. We believe, however, that the weight of authority is, that it merely affects credibliity. Peo. v. Chin Mook Low, 51 Cal. 797; Nesbit v. State, 43 Ga. 238; State v. Elliott, 45 Iowa 486; Hill v. State, 64 Miss. 31, 1 So. 494. Even in Oregon it has been held that evidence of such disbelief is admissible to discredit a dying declaration. Goodall v. State, 1 Or. 333, 80 Am. Dec. 396.

We greatly doubt the statement that exigency is alone sufficient for competency as evidence of a dying declaration. We think exigency and a presumption of a solemnity militating against untruth together conspiring are necessary to create competency. Exigency alone as a basis is refuted by its being made necessary to show, not that decedent is dying, but that he fully realizes death is impending. Exigency alone would care nothing about realization of impending death. Yet it is universally accepted that the foundation for admissibility must be laid in both of these facts.

We scarcely also believe that there is any test in the fact that nonbelief in future rewards and punishments is not an objection to the competency of a witness. Dying declarations are an exception to the rule of incompetency of hearsay evidence and to the right of an accused to be confronted by the witnesses against him. This exception should be allowed to be challenged in whatsoever way may militate against the weight of evidence within its scope. It is not thus to single out a witness in an instruction, but it is to single out evidence, which may be inherently weak, because the presumption of solemnity which attends its admission may be rebutted wholly or partially.

NORMAL CORPORATIONS vs. CONTINENTAL MONOPOLIES—BRIEF FOR PLAINTIFFS.

The creation of normal corporations should be left, as now, to the several states, but "trusts" and corporations with unrestrained power to aggregate capital, should not be allowed anywhere in the United States.

Monopolies have always been held to be "against the common law." In the Crescent City Slaughter-House Monopoly case (111 U. S. 746), Justice Bradley (Justices Harlan and Woods concurring with him as to the grounds of the decision), said: "I hold it to be an incontrovertible proposition of both English and American public law that all mere monopolies are odious and against common right. * * * Monopolies are the bane of our body politic at the present day." The people of the State of Texas have declared in their constitution that "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." The constitutions of Arkansas, Tennessee and North Carolina

have the like anti-monopoly provisions. If the constitution of each of the other states (including New Jersey), had such a provision in its Bill of Rights, no state legislature could create and legalize monopolies.

Industrial monopolies are, to say the least, undesirable persons. The people of the United States do not allow the states to naturalize undesirable persons. The State of New Jersey cannot naturalize foreign criminals and paupers. And yet New Jersey can, and does by her legislation, authorize non-resident "captains of industry" to organize in any branch of industry a corporate being with the capacity to mass against normal corporations whatever amount of capital may be required to kill competition and control the output and prices of the products of that industry. And since this monopolizing creature of New Jersey legislation is one legal person, and therefore cannot conspire with itself and become, by its several act, guilty of criminal conspiracy, it follows that this artificial person can, by a legal method just as effectual as a criminal "boycott" ("concerted abstinence from business intercourse with a person"), "hold up" with impunity the carriers of its products, the dealers therein, and its employees, until they submit to the demands of its board of directors. This creature of New Jersey legislation is immune as to acts done by the authority of its board of directors when the same acts, if done by the officials or members of a labor union, would be criminal. (See 208 U. S. 161; 208 U. S. 274).

But the evils of trusts and monopolies result not so much from the conspiracies of trustees and boards of directors, as from the power afforded by the abnormal centralization of capital in private enterprises. Would the Standard Oil Company be any the less a menace to competing corporations were its wealth entirely in the hands of an individual, or partnership or corporation sole?

It is not important whether a religious corporation is sole or aggregate—whether church property is vested in a Catholic Bishop or is under the control of Protestant trustees, but it is of the utmost importance whether or not religious corporations or any other kind of corporations shall be allowed to acquire and hold land without any restriction as to quantity. Land, like all commodities, can be freely bought and sold by natural persons. Illinois and the other states allow this to be done to any extent, because individual ownership of large tracts of land is generally, under our laws of equal inheritance, distributed or dissipated during the second or third generation. Why does Illinois restrict corporations as to the ownership of real estate to "so much as shall be necessary for the transaction of their business?" The ready answer is: To preserve her lands from the grasp of gigantic monopolies.

The farmer boy, during his minority, serves an apprenticeship in the business of farming; after his majority he becomes a tenant of his father or of some neighbor, and in a few years he has a farm of his own. He is an independent farmer. Suppose the next legislature of Illinois should be induced by some "special interest" to amend the incorporating statutes of the state so as to allow the formation of real estate corporations with the power to buy and control land without any restriction as to quantity, how long would it be before some Standard Land Company or Peoria Whiskey Company would own the most valuable lands (for instance, the corn belt), of Illinois? In such case the farmers of McLean county, the richest agricultural county in the United States, would become mere tenants, or, more likely, hired help, subject to "lockouts" at the arbitrary will of their overseers. Land monopolies in England and Ireland antedate the Statutes of Mortmain and Captain Boycott.

All industrial monopolies are of the same baneful nature and are as fatal to the free play of competition in any kind of industry as in that of farming.

With the tremendous power which the centralization of hundreds of millions of dollars in one corporate person gives to its

board of directors and with the immunity of such person, acting by itself, from criminal conspiracies, and its exemption from the laws of inheritance, is it any wonder that New Jersey has become the breeding-place of monopolies?

Unrestrained power to aggregate capital in a particular industry is the club by which a giant corporation is enabled to strike down all normal corporations in that industry. Withhold or take away the club and the corporation has not the power to destroy competition and become a monopoly.

No corporation or trust can monopolize any branch of a profitable industry without great wealth. But when the assets of a corporation in the oil, the tobacco, the rubber, the sugar, the steel, or any other industry of the country, amount to hundreds of millions of dollars, the corporation is sure to monopolize that industry; for it aims to do this, and has the financial ability to do it. Where a corporation is organized for the purpose of capturing an industry and has the means to accomplish its purpose, there can be no doubt as to the result.

Normal corporations are desirable persons. The more of manufacturing and industrial corporations we have scattered among the several states, the better it is for the country. The distribution of opportunity and wealth is far better for both capital and labor than their concentration and control by plutocratic trusts and monopolies. Steam and electricity in moderate quantities for proper purposes are good things, but too much of either of them will be attended with fatal results.

A corporation is an artificial being created by legislation—a sort of machine like an automobile, and concentrated wealth is the power of the machine. At first the drivers of automobiles had license to turn on the power at will, but the destruction of life and property on the highways of the country and the streets of our cities soon became so great that the public safety required the enactment of speed limits. And so experience has shown that the public welfare of the country requires that corporations should be reasonably limited as to their aggregation of wealth in order to prevent their becoming monopolies.

When the legislature of a state, with the approval of its highest court (See 58 N. J. Eq. 507; also 210 Pa. St. 288), is so indifferent to the public welfare of the whole country as to encourage and promote large aggregations of corporate capital, without regard to whether the real purpose in organizing these large corporations is or is not to destroy—"to kill competition," is it not time for some higher power, if there be one, to intervene on behalf of common right, equal opportunity and free competition. The legislature of New Jersey does not and will not put a reasonable limit to the aggregation of capital—the power of the autocratic machines it creates. Does there now exist anywhere any other governmental power that can limit the enormous aggregation of capital,—the stupendous power of the Standard Oil Company or any other New Jersey monopolistic corporation?

It may be replied that the people of the State of New Jersey can withhold from their own legislature and their own corporations whatever power they please. But under our system of representative government the people of a state do not charter—do not create private corporations. They entrust that power to the legislature. The people of New Jersey could have restricted the power of the legislature in the creation of corporations. They could have learned wisdom from the precepts and practice of those great anti-monopoly leaders, Thomas Jefferson and Andrew Jackson. They could have followed the example of the states of Texas, Arkansas, Tennessee and North Carolina, and have put in their Bill of Rights the sovereign mandate that "monopolies shall never be allowed." But they have not done this. And so the people of the United States might have had the foresight—the political wisdom to have put in their fundamental law, the Constitution of the United States, an anti-monopoly provision, and have authorized congress to enforce the

provision by appropriate legislation. But they have not done this.

Under the authority given to congress "to regulate commerce among the several states" it has been attempted to curb the power of abnormal corporations to kill or capture competing normal corporations. But the United States Supreme Court in the Sugar Monopoly case (156 U. S. 1) has held that the federal act of 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies" does not apply to manufacturing monopolies, because the production of an article only indirectly affects inter-state commerce.

We look in vain for any existing governmental power (outside of the trust controlled legislature of New Jersey), with authority to reasonably limit the capital of New Jersey corporations and thereby prevent their becoming monopolies. Hence the imperative necessity of a constitutional amendment which will authorize adequate federal legislation for the prevention and suppression of continental monopolies.

Such an amendment might be as follows: "The congress shall have power to prevent and suppress monopolies throughout the United States by appropriate legislation."

The people of Texas and other anti-monopoly states have not surrendered any state right by the constitutional provision that "monopolies shall not be allowed." On the contrary, they have thereby prevented at least their own legislatures from becoming promoters of monopolies. The people of the United States did not surrender any right they previously enjoyed by putting into the federal constitution a provision for the protection of "life, liberty and property" against federal and state legislation —a provision as old as *Magna Charta*. Nor will they surrender any right when they adopt an anti-monopoly amendment to the constitution. The captains of monopoly have nothing to fear from the legislature of the State of New Jersey—the chief promoter of their stupendous aggregations of capital. But they do fear, and with good reason, that the general government, the common representative of the people of all the states, would so limit the capital and capitalization of all private corporations as to prevent their becoming monopolies. Hence their cry of state rights.

And a voice is heard from New Jersey and is re-echoed by all the organs of monopoly that "guilt is personal." Can we indict a state legislature for creating and fostering corporate monopolies?

Monopolies are "against the common law." They have been denounced from the bench of the supreme court as "against common right" and as "the bane of our body politic at the present day." The people of the United States believe in the distribution of opportunity to acquire wealth honestly, and not in the centralization of power to take it arbitrarily. They will not much longer suffer the multi-millionaires of Cleveland, Pittsburg and New York City, under the legal fiction of their being citizens of New Jersey, to organize monopolies in that state for the destruction of the normal corporations of the other states. The adoption of the proposed Income Tax amendment and an Anti-Monopoly amendment would go much farther than any doubtful legislation under the inter-state commercial clause of the constitution, in bridging the widening gulf between capital and labor, and would mark an epoch in the history of free government.

R. M. BENJAMIN.

Bloomington, Ill.

EVIDENCE—ISSUE OF FORGERY.

In 68 Central Law Journal, p. 343, appears a contributed article on admission of evidence in issue of forgery, in which (p. 350) it is stated: "Texas at first held rigidly to the common law rule.[1] This decision met with such dissatisfaction as to place the court in serious embarrassment. The court not being disposed to recede from a position so deliberately taken, the legislature was importuned, and to relieve the situation, a law was passed which provides, inter alia, that it is competent in every case to give evidence of handwriting by comparisons made by experts or by the jury."[2]

(1) Citing Hanley v. Gandy, 28 Tex. 211.
(2) Citing Paschol's Dig. Art. 3132, should be 3132, Code of Criminal Procedure.

This article is found in the Code of Criminal Procedure of August 26th, 1856, Article 667,[3] as follows: "It is competent in every case to give evidence of handwriting by comparison, made by experts or by the jury; but proof by comparison only, shall not be sufficient to establish the handwriting of a witness who denies his signature." Article 666,[4] preceding this, provides: "Where a subscribing witness denied or does not recollect the execution of an instrument to which his name appears, its execution may be proved by other evidence." These two articles must be taken together to understand the construction of article 667. The rules of evidence as known to the common law of England, both in civil and criminal cases, govern in the trial of criminal actions in Texas, except where in conflict with the code,[5] and the same rule applies in civil cases.[6] Judge Willson in his note to Article 794, Original Code Article 667, Paschol's Digest Article 3132, states: "The fact that the statute in criminal cases, permits evidence of handwriting by comparison, does not change the well established rules as to such testimony. Such evidence has always been considered feeble, and in some states unsafe to act upon, and in civil cases such express statutory permission to introduce such evidence is not given.[7]

The case of Hanley v. Gandy, decided in 1866, has not been overruled or questioned by any Texas authority. In 1887 the Federal Supreme Court, decided a Texas case,[8] and directly approved the case of Hanley v. Gandy, on this question. In this case Justice Bradley, who delivered the opinion of the court, states:

"It is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on the trial, and proved or admitted to be his, will not be allowed, from such knowledge, to testify to that person's handwriting, unless the witness be an expert and the writing in question is of such antiquity that witnesses acquainted with the person's handwriting cannot be had.[9] It is also the result of the weight of authority that papers cannot be introduced in a cause for the mere purpose of enabling the jury to institute a comparison of handwriting, said papers not being competent for any other purpose.[10] But where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison.[11] The history of this last rule is well stated in Medway v. U. S., qua supra. In Griffith v. Williams, it was stated by the court, that 'Where two documents are in evidence, it is competent for the court or jury to compare them. The rule as to the comparison of handwriting applies to witnesses who can only compare a writing to which they are examined with the character of the handwriting impressed upon their own minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence.' In Doe v. Newton, Lord Denman said: 'There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied, to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the court to enter with the jury into that inquiry, and to do the best it can, under circumstances which cannot be helped.' The other judges expressed substantially the same view. 'The true rule on this subject,' said Justice Johnson,[12] 'is that laid down in Doe v. Newton, that where different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from such comparison. But other instruments or signatures cannot be introduced for that purpose.'[13] This rule is not contravened by the decisions of the Supreme Court of Texas or of this court. The leading case in Texas on comparison of handwriting is Hanley v. Gandy,[14] which only decides that other papers, not connected with the cause, cannot be introduced for the mere purpose of instituting a comparison of handwriting. No case decides that a signature to be proven cannot be compared by the jury with other papers or signatures of the party, properly in evidence in the cause. Strother v. Lucas,[15]

(3) Willson's Texas Crim. Stat. Art. 794.
(4) Id. Art. 793.
(5) Code of Criminal Procedure, Art. 763. Original Code Art. 638.
(6) Sayle's Civ. Statutes, Arts. 2299, 3258, act of December 20th, 1836, Paschol's Dig. 3706, and act of 1840, Paschol's Dig. art. 978.
(7) Citing Heacock v. State, 13 Tex. Crim. App. 97; Jones v. State, 7 Tex. Crim. App. 457; Hanley v. Gandy, 28 Tex. 211.
(8) Williams v. Conger, 125 U. S. 397-426, 31 L. Ed. 785, 786.
(9) Greenl. Ev. sec. 578.
(10) Greenl. Ev. secs. 579, 581.
(11) Griffith v. Williams, 1 Cromp. & J. 47; Doe v. Newton, 5 Ad. & El. 514; Van Wyck v. McIntosh, 14 N. Y. 439; Miles v. Loomis, 75 N. Y. 288; Medway v. U. S. 6 Ct. Cl. 421; McAllister v. McAllister, 7 B. Mon. 269; 1 Phil. Ev. 4th Am. Ed. 615; Greenl. Ev. sec. 578.
(12) Van Wyck v. McIntosh, 14 N. Y. 439, 442.
(13) See Amer. note to Griffith v. Williams, 1 Cromp. & J. 47, Phill. ed.
(14) 28 Tex. 211; S. C. 91 Am. Dec. 315.
(15) 31 U. S. 6 Pet. 763; 8 L. Ed. 573.

the leading case in this court, relates to the competency of a witness to testify as to the genuineness of a signature without having any knowledge of the party's handwriting; and the court held that such evidence was not admissible. The case of Moore v. U. S.,[16] affirms the rule in question in cases where the paper used as a standard of comparison is admitted to be in the handwriting of the party, or where he is estopped from denying it to be so; it does not disaffirm the rule as applied to cases where the standard is clearly proved to be in such handwriting."

The case of Hanley v. Gandy,[17] follows the common law rule, of excluding proof of handwriting by comparison with an instrument not relevant to any issue in the case, and this is the general rule of constructions in Texas, unless the witness testifies as an expert.[18] While this is the general rule in all common law states, yet there are exceptions to the rule as well understood as the rule itself, as follows: "If it were possible to extract from the conflicting judgments a rule which would find support from a majority of them, perhaps it would be found not to extend beyond this; that such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them; which is only where the papers are either conceded to be genuine, or are such as the other party is estopped to deny; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation of his own testimony."[19]

The case of Mardes v. Meyers is well supported by courts, federal and state.[20] The common law rule has in England been changed to some extent by statute.[21] The Texas statute on this question applies to criminal cases only,[22] and not to civil.[23]

(16) 91 U. S. 270; 23 L. Ed. 346.

(17) Supra.

(18) Mardes v. Meyers, 8th Tex. Civ. App. (1894) 548; 28 S. W. R. 693.

(19) Greenl. on Ev. Sec. 581; Mardes v. Meyers, supra; Jester v. Steiner, 86 Tex. 420; Cook v. Bank, 33 S. W. R. 999; Eborn v. Zimpleman, 47 Tex. 518; Hancock v. State, (1882) 13 Tex. Civ. App. 97.

(20) University of Illinois v. Spalding, (1901) 71 N. H. 163; S. C. 62 L. R. A. 817, and exhaustive note, pp. 817-874, reviewing authorities. See Texas cases, pp. 857-859. "Comparison of ancient writings," pp. 861-862. Mardes v. Meyers, and other Texas cases, p. 862. Jones on Evidence, 2nd Ed. (1908) Secs. 551, 552.

(21) Jones Evidence, 2nd Ed. p. 694, and n. 92.

(22) Code Crim. Proc. (1856) Art. 667; Paschol's Dig. Art. 3132; White's Code Crim. Proc. Art. 794; McIlwanes Ann. Dig. (1908) Art. 794.

(23) University of Illinois v. Spalding, 62 L. R. A. pp. 857, 858; Watson v. State, (1880) 9 Tex. Crim. Rep. 237; Caldwell v. State, (1890) 28 Tex. Crim. Rep. 566; 14 S. W. R. 122; Cannon v. Sweet, (1895) 29 S. W. R. 948.

(24) Austin Session 1867 to Austin Session 1874; Texas Rep. vol. 30 to vol. 40.

(25) Dallam, p. 357, January Term, 1840.

(26) Law Notes, March, 1910, p. 226.

The case of Hanley v. Gandy was decided ten years after the adoption of our Code of Criminal Procedure with this article on evidence; therefore our supreme court could not have been embarrassed by this decision. The Supreme Court of Texas, excepting our Military Supreme Court,[24] has from the first opinion reported,[25] been presided over by judges whose opinions rank with the best where the English language is used. Our Federal Supreme Court, the highest authority of any court, gives Texas cases the third place in number of citations of our state courts.[26] There would be some trouble in Texas, in inducing the profession to believe that, we ever had in Texas, a court of last resort, with the exception above stated, that would call upon the legislature to enact a law to relieve the court of an erroneous decision. Any court will commit error, sometimes. The greater and stronger the court, the more ready to admit mistakes and correct as far as possible by overruling an erroneous opinion, when found clearly to be such, and this without legislative interposition.

JAMES E. HILL.

Livingston, Texas, December 28, 1910.

HUSBAND AND WIFE—COERCION.

STATE v. MARTINI.

Supreme Court of New Jersey, November 25, 1910.

78 Atl. 12.

(Syllabus by the Court.)

A married woman, engaged by her husband in his store in the sale of obscene cards, is presumed in law to be selling the same under his coercion, and the common law, which exempted her from legal responsibility for such act, still subsists in this state.

MINTURN, J.: The assignments of error in this cause present various questions for consideration, but the case is determinable upon the disposition of one, and that the main question presented by the record.

The defendant was indicted and convicted for violating the fifty-third section of the

crimes act (P. L. 1898, p. 808), which makes it a misdemeanor for any person without just cause to utter or expose to view, or have in his possession with such intent, or to sell, any obscene or indecent book, picture, etc. The record shows that she was a married woman, living with her husband, who conducted a picture postal card establishment at Atlantic City. One George Herbert testified for the state that he with another entered the place, and asked the husband to supply them with Jigger Soap cards. Defendant at the time was waiting upon some ladies in the store, but the husband told the witness that the defendant would wait upon him when she would be at leisure. Shortly after the husband called defendant and told her to wait upon the witness, and she then, in obedience to this direction, supplied to the witness the Jigger Soap Cards, which are admittedly obscene and indecent, and which were the cards produced upon the trial. When the witness entered the store, the husband was seated in the rear of the place, and, while the wife was carrying out his instruction and waiting upon the witness, he retired into a back room, which was separated from the store only by curtain hangings. The defendant's testimony was of a cumulative character, and emphasized the situation so far as the immediate presence of the husband was concerned. This situation at the close of the case led to a motion in behalf of the defendant for the direction of a verdict of acquittal, which motion the learned trial court denied. The motion was predicated upon the proved and apparently undisputed fact that the husband being upon the premises and in a position where his presence could influence the conduct of the defendant the law absolved her from guilt, in the absence of any testimony from which it might be claimed that the presumption of law of the existence of coercion on the husband's part was legally rebutted. We think, under these facts and circumstances, the defendant was entitled to a direction of acquittal.

In Emmons v. Stevane, 73 N. J. Law, 349, 64 Atl. 1014, this court held that the common-law rule which excuses a wife from liability for a tort committed by her in the presence of her husband prevails in full force in this state. That case was reversed upon another ground by the Court of Errors, but the doctrine in question was approved in the opinion. The doctrine thus applied to a case of tort-feasance was substantially a reiteration of the law as promulgated thirty years earlier in Hildreth v. Camp, 41 N. J. Law, 306, and which remained unquestioned during that interim. The rule thus applied is but the application in that branch of the law of the general common-law doctrine applicable to the status of the wife in every department of the common law, the effect of which was that both her property and her personality were subjected to the will and dominion of her husband. "Therefore," says Blackstone, "if a woman commit theft or burglary or other civil offences against the laws of society by the coercion of her husband, or even in his company which the law construes a coercion, she is not guilty of any crime, being considered as acting by compulsion, and not of her own will." Book 4, p. 28. In the theory and spirit of the law she under the marital relation was deprived of the free will and consent necessary to the commission of crime, and she was therefore accorded the legal status of a servant or slave, so that Blackstone was enabled to apply to her the rule of the civil law, "Procul dubio quod alterum libertas alterum necessitas impellent." Id. 29. So it has been consistently held in all jurisdictions that have inherited the common law, except where the rule is changed by statute, that where the married woman commits an offense (except probably murder and manslaughter, Hale P. C. 47) in the presence of her husband or though not in his presence, near enough to be under his immediate influence and control, she is presumed to have acted not voluntarily but under his coercion and he is responsible while she is excused. 1 Hale P. C. Sec. 10. Commonwealth v. Neal, 10 Mass. 152, 6 Am. Dec. 105; Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559; Roberts v. People, 19 Mich. 401; Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684. That she was more active than he in the commission of the crime does not render her guilty, but is a circumstance to be considered in rebutting the presumption of coercion, for her guilt depends, not on her activity, but upon whether her activity was voluntary or caused by the husband's coercion. State v. Houston, 29 S. C. 108, 6 S. E. 943.

The test of his presence does not require proof of a formal command on his part to her to do the act, but rather is limited to the inquiry whether his proximity could have exerted an immediate influence and control over her. In Commonwealth v. Burk, 11 Gray (Mass.) 437, the husband was not in the store, but was on the premises when the wife made an illegal sale of intoxicating liquors, and she was held guiltless. So, where he was not in sight, it was held his momentary absence did not relieve her from his influence and control. Commonwealth v. Munsey, 112 Mass. 287.

The case for the state and the entire evidence in the case at bar shows, not only the

presence of the husband in the store, but his reception of the customer, and his direction, equivalent at common law to a command, to the wife to wait upon the customer, and her obedience to his wish, while ne at all times during the sale was within her view and call. This situation furnishes the status that at common law absolved the wife from guilt in the absence of testimony rebutting the presumption. Finding no such testimony in this case, we think the learned trial court should have directed an acquittal.

The judgment of conviction will therefore be reversed.

NOTE.—*Presumption of Coercion by Husband Where Wife Commits Crime Prima Facie Only.*—The courts are pretty well in accord on this question, except that they do not seem clear as to whether evidence of the want of coercion must be gathered from other facts than from what the wife says or her manner of testifying. We submit some cases.

In State v. Harvey, 130 Iowa, 394, 106 N. W. 938, the court said: "The law indulges a presumption that the participation of a wife in the crime of her husband or the act of a wife in the commission of a crime in his presence is the result of coercion on his part, and that she is not legally chargeable with guilt until that presumption has been removed by evidence tending to show her to have acted of her own will and accord. Com. v. Flaherty, 140 Mass. 454, 5 N. E. 258; State v. Fitzgerald, 49 Iowa 263; State v. Kelly, 74 Iowa 589; State v. Williams, 65 N. C. 398; Goldstein v. People, 82 N. Y. 231."

This case seems along the line of the principal case, but it is not distinctly declared that this is merely *prima facie* and there was nothing in the facts of the case which required this to be held, an instruction of the court causing the above observation to be made in a somewhat incidental way.

In Com. v. Adams, 186 Mass. 101, 71 N. E. 78, the Massachusetts doctrine is reviewed and it was said: "It is settled in this commonwealth that when a married woman is indicted for a crime, and it is contended in defence that she ought to be acquitted because she acted under the coercion of her husband, the question of fact to be determined is whether she really and in truth acted under such coercion, or whether she acted of her own free will and independently of any coercion or control by him. To aid in determining this question of fact, the law holds that there is a presumption of coercion from his presence at the time of the commission of the crime; this presumption, however, is not conclusive, and it may be rebutted." Further along in this opinion, where the case showed that the defendant and her husband who escaped, the two were at a showcase, looking at some rings in a tray, and the clerk's attention being distracted a moment, a ring was abstracted and the two went away in the crowd in a department store and the woman was caught, but it was not shown, though searched, that she had the ring, it was said: "The defendant has argued that the whole conduct of the woman in the store must be thrown out in considering whether the presumption is overcome, because during all this time she was in the presence of her husband. It is true that the presumption applies to all her conduct, but as the presumption is not a conclusive one, her conduct, even in her husband's presence, may be such as alone and by itself to overcome the presumption. See in this connection, Com. v. Moore, 162 Mass. 441."

This case, which is also reported in 62 Atl. 692, 85 Am. St. Rep. 498, shows a wife had been convicted of perjury. In the opinion it was said: "This case was tried as if the offence charged were an ordinary crime committed by the defendant in the presence of her husband. Treating it as such, we have no doubt, that the rulings given and the refusal to rule as requested, were right. It is a general rule that, where a criminal act is done by a wife in the presence of her husband, or in proximity to him, a presumption in her favor is raised that she is acting under his coercion. This presumption is, however, not conclusive, and may be rebutted by the testimony or attendant circumstances, and it is for the jury to say whether or not she acted under coercion or of her own free will." Then the court goes on to argue that there "was evidence to rebut the presumption," that the charge was for perjury committed in the trial of an offense charged against her and her husband and as to that trial it was provided by law that she could not be compelled to be a witness. She therefore must be presumed to have taken the stand of her own free will. "The jury had the right to determine whether her testimony was given voluntarily or under coercion." The court also states it is inclined to the opinion that the rule of presumption of coercion does not apply to such a case at all.

This reasoning seems somewhat weak. Coercion is nothing without duress. This is not forbidden in the case of perjury, any more than in the commission of other criminal acts. Indeed, we have the specific offence of subornation of perjury, and this may be accomplished by menace as well as by bribery or persuasion. If the court had argued that the attendant circumstances were in her being under the protection of the court while testifying or that her manner of testifying indicated her freedom from coercion, the case would be some support to the Adams case. As it was discussed, however, the intimation is opposed to that. The opinion, however, cites for other cases in accord with its view as to perjury, Mockin v. People, 115 Ill. 312; Mattingly v. State, 8 Tex. App. 345; State v. Maxwell, 28 La. Ann. 361.

In Smith v. Meyers, 54 Neb. 1, 74 N. W. 277, the question of presumption of coercion arose in a somewhat singular way. It was attempted to discredit a wife's testimony by claiming she was not subject to the penalties of perjury because of the presumption of coercion by the husband. The court said: "The general rule stated may have the sanction of age and may have been justified by the social conditions of primitive times, when we are told that the husband might moderately chastise his wife. * * * We do not care to inquire what real sanction it finds in adjudicated cases—possibly no more than is found for the law of chastisement. Certain it is that such presumption runs counter to our broad laws as to

the competency of witnesses and counter to the reason of men, in view of the domestic relations as they now exist, protected by more enlightened custom and a kindlier law. A wife is no longer a marionette, moved at will by the husband, either in fact or in law, and with the legal recognition of a separate and responsible existence she must assume some of the burdens of life—among others, that of testifying to the truth under the customary penalties." There is a large measure of unnecessary rhetoric here that might as well have been omitted, but there seems also some measure of truth in what is indicated about policy. But after all statutes freeing women from the ancient disabilities are strictly construed and it is customary to rule that nothing as to her condition at the common law has been removed, unless expressly so stated.

The rule of presumption of coercion was by West Virginia Supreme Court of Appeals held not to apply to the offence of keeping a house of ill-fame because the court, quoting from 1 Hawk. P. C. C., §12, said: "For this is an offense as to the government of the house in which the wife has a principal share, and also such an offense as may generally be presumed to be managed by the intrigues of her sex." State v. Mamie Jones, 53 W. Va. 613, 45 S. E. 916. It is somewhat lowering the dignity of decision to see a rule of presumption displaced by a quotation like that, though it may be urged that, if it thus can be displaced, it is on too uncertain a foundation to be entitled to any respect.

In State v. Ma Foo, 110 Mo. 7, 19 S. W. 222, the court approves the doctrine that the presumption is *prima facie* and sustained an instruction, that the wife might be found guilty, even though the crime is committed in his presence if there was no incitement and no consent on his part. The court said: "Learned counsel for defendant desire us to ingraft an additional modification on the rule of evidence, and require the state to prove that the husband not only was not the inciter or responsible criminal agent in the commission of the crime, but that he actually disapproved it. * * * This is not the law. There is little in the present organization of society upon which the *prima facie* presumption itself can stand, and certainly nothing calling for any extension of the presumption."

An Arkansas statute provides that the presence of the husband merely is no defense unless "it appear from the circumstances in the case that violence, threats, command or coercion were used" Freel v. State, 21 Ark. 212. The Missouri court said this rule "is more in accord with the spirit of the age in which we live. In New York, by the penal code of 1881, sections 17 and 24, the presumption is entirely abolished."

If the principal case is right, there ought to be an instruction for defendant where it is merely shown the husband is present, unless there be distinct proof that he exercised no compulsion or actually was ignorant of the commission of the crime. The Massachusetts cases would seem to allow the case to go to the jury under almost any circumstances and let them consider whether or not the wife was coerced. In other words, the presumption in that state seems almost non-existent practically. C.

CORAM NON JUDICE.

THE CORPORATION TAX CASES.

N. C. C.

The Supreme Court in its decision to be hereafter rendered upon the corporation tax, will not only have had the advantage of argument by many learned counsel, but it will also be required, because of what is involved in each of the cases, to regard the statute from many angles. Thus there are fourteen different cases consolidated in the hearing, and while there is common ground among all, yet some are affected in special ways. Thus as to public utilities corporations it is urged that the government is attempting to tax "the agencies and instrumentalities" of a State.

Decision shows that the rule is as strict against this, as that a state shall not tax the agencies and instrumentalities of the government, because it is said "the power to tax is the power to destroy." It is the writer's personal view that contention is also true as to purely private corporations, but it is so in an additional sense as to public utility corporations. If the government interferes with the desire of the State to encourage private corporations, it certainly may practically defeat, or, as is said, 'destroy" its power to create any corporation. This point receives practical illustration in the contention of one of the corporations, whose case is before the court. This corporation lays stress upon the fact that its principal competitor for years has been a partnership, the two concerns enjoying practically equal advantages and about the same amount of capital invested. Competition between the two is alleged to be very sharp. The partnership gets an advantage in not being subject to the tax. This well illustrates the position this journal has taken with regard to this tax. We contended it was not a tax on a corporation at all, but purely a tax on the shareholders of the corporation. 70 Central L. J. 91. We thought that a corporation was incapable of enjoying an income over and above expense of operating, because eo instanti that constitutes a fund to be distributed in dividends or passed to reserve. If the latter, it is merely borrowed, in legal effect, from shareholders. This Vermont case seems to give point to our contention. We will suppose each concern has a profit of $10,000 on the same date. The parners take out $9,000 and the shareholders $9,000. Thus the partnership has increased its capital $1,000, but the corporation's capital is as before. Or say the partners and the shareholders alike draw out the entire profit. The latter receive $1,000 less than the former. Who pays the tax? Another of the cases urges that its operation is entirely local and enforced disclosures of its business will work an injury to its shareholders, a contention which presents from another view the shareholders' rights. Then there are claims by corporations that are realty companies whose revenue is merely from real estate, bringing into relief more squarely questions passed upon in the Pollock income tax cases. It might additionally be thought concerning such corporations, that the shareholder property theory is more pertinent, still, because such a corporation looks more like a holding company for tenants in common or a trustee or a mere agency to manage property and distribute its earnings. There are probably other features peculiar to these cases severally, and

the opinion or opinions to be rendered upon the constitutionality of this tax will possibly be more interesting than those in the Standard Oil and Tobacco cases. There are big questions in these cases and their determination should mark an era in this country. It is perhaps very fortunate that all these cases are simultaneously under advisement by our great tribunal. A comprehensive view of federal power ought to be afforded by the decisions in the three, with each read in the reflected light of the others.

BOOK REVIEWS.

THE MODERN CRIMINAL SCIENCE SERIES.

At the National Conference of Criminal Law and Criminology, which was held in Chicago in 1909, we are advised the American Institute of Criminal Law and Criminology was organized.

To promote its mission a committee, consisting of Wm. W. Smithers, Secretary of the Comparative Law Bureau of the American Bar Association, Professors Ernest Freund and Roscoe Pound, of the University of Chicago, Professor John H. Wigmore, of the Northwestern University, and Professor Maurice Parmelee of the University of Kansas, was chosen to select important treatises on criminology in foreign languages and arrange for their translation and publication.

This committee has selected several works out of a mass of material, and presents as the initial volumes in a Modern Criminal Science Series I. Modern Theories of Criminality, by C. Bernhard de Quiros, translated from the second edition of that work in the Spanish language, II. Criminal Psychology by Professor Hans Gross, being a translation from a second and enlarged edition of the original in German, published in 1905.

These numbers are to be followed by seven others which are to complete the series as selected by the members of the committee, and the full set would seem to make a valued compilation in such a series. The painstaking necessary to make such a selection seems fairly guaranteed in the constitution of the committee, and students should feel grateful for a reliable guide when there is such a mass of writing on such a subject, a great part of which is mere theorizing by different authors.

The volumes of the series, assuming that those which are to appear will be like their predecessors, are attractive in binding, typography and general excellence in the publisher's art.

Publishers are Little Brown & Company, Boston, 1911.

AMERICAN STATE REPORTS, VOL. 134.

Vol. 134 of these reports contains selected cases from 18 of the states and the usual number of extended annotations for which the series is justly esteemed.

These issues represent a vast amount of labor and the uniformity in excellence of them rather limits opportunity to do more than repeat former commendation.

We may, however, mention a few of the elaborate notes, which are found in this volume, thus: "The Right to Waive Tort and Sue in Assumpsit," covering seven pages of small print; "When a Person Holding Property under a Conditional Sale May Transfer a Perfect Title," nine pages; "The Confidence Game," six pages; "When Sureties Cause of Action Against the Principal Becomes Perfect and Enforceable," twelve pages; "Declarations of Former Owners of Land as Evidence Against Their Successors in Title," 16 pages; "Right of a Building Contractor to Recover for a Substantial Performance of his Contract," 18 pages, and other such notes, besides the usual brief notes which are at the end of each case.

The fact is that this series has beggared commendation in the establishing of a standard and it seems now that it is only necessary to call lawyers' attention to the fact that another report has appeared for its excellence to be assured.

The volume is from the well known publishers, Bancroft-Whitney Company, San Francisco, Cal., 1910.

BOOKS RECEIVED.

The Law and Practice in Bankruptcy under The National Bankruptcy Act of 1898. By Mr. William Collier. Price $7.50. Albany, N. Y. Matthew Bender & Co. Review will follow.

Black's Law Dictionary, Second Edition, Containing definitions of the terms and phrases of American and English Jurisprudence, Ancient and Modern. By Henry Campbell Black, M. A. Price $6.00. St. Paul, Minn. West Publishing Co. Review will follow.

Reports of American Bar Association, Vol. XXXV, 1910, held at Chattanoga, Tenn., August 30 and 31 and September 1, 1910. Baltimore, Md. The Lord Baltimore Press.

Equity in Procedure—The Prescriptive Constitution. Equity, Its Principles in Procedure, Codes and Practice Acts. By William T. Hughes. Price $6.00. St. Louis, Mo. Central Law Journal Co.

Missouri Bar Association, 1910. Proceedings of the twenty-eighth Annual Meeting, held at Excelsior Springs, Mo., July 27th and 28th, 1910.

Law in Shakespeare. Commentaries on the Law in Shakespeare, with Explanations of the Legal Terms used in the Plays, Poems, Sonnets, and Discussions of the Criminal Types Presented. By Edw. J. White. Price $3.50 delivered. St. Louis, Mo. The F. H. Thomas Law Book Co. Review will follow.

HUMOR OF THE LAW.

Chief Justice Taney, driving through the Tennessee mountains, once broke one of the shafts of his buggy. A small colored boy came riding by on a mule. The justice hailed him.

"Here, my boy," he said, "can you help me fix my buggy."

"Sure, boss," answered the boy, and cutting a hickory withe, he soon fixed the shaft so that it was quite serviceable.

"Well, well," said the learned judge, "now why couldn't I have done that?"

"I dunno, boss," replied his "first aid," "unless some folks knows more than others."—Success.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Accident Insurance**—External and Visible Marks.—An accident insurance company held entitled to provide in a policy for payment of a less sum in case of death from bodily injuries of which there exists no external or visible mark.—Aetna Life Ins. Co. v. Bethel, Ky., 131 S. W. 523.

2.——Notice of Death.—Where the beneficiary of a casualty policy was ignorant of its existence for several months after the insured's death, her immediate notice of insured's death on finding the policy was sufficient, although it called for notice within 15 days after the accident.—Continental Casualty Co. v. Lindsay, Va., 69 S. E. 344.

3. **Action**—Contract on Tort.—Where an officer of a corporation converted its property to his own use, the corporation or its assignee could waive the tort and sue him for goods sold and delivered.—Harman v. Loscalzo, 125 N. Y. Supp 517.

4. **Adoption**—Rights of Adopted Children.—A child by adoption held to acquire no right except the right to inherit from the adopting parent.—Wallace v. Noland, Ill., 92 N. E. 956.

5. **Adverse Possession**—Taking Successive Possessions.—A possession taken by a purchaser under a deed reserving a lien to secure the purchase money notes is available to the vendor as against an adverse claimant.—Kirby v. Boaz, Tex., 131 S. W. 533.

6. **Assignments**—Time Checks.—Time check issued by an employer to an employee held primarily a contract to pay money on a day named, and transferrable.—Aldridge Lumber Co. v. Graves, Tex., 131 S. W. 846.

7. **Bail**—Capital Charge.—Defendant, in jail on charge of murder, suffering from malady endangering life, will be admitted to bail.—Ex parte Fraley, Okl., 111 Pac. 662.

8. **Bankruptcy**—Title to Property Conditionally Sold.—Where a purchaser of personal property under a conditional sale sold the property to the bankrupt, the bankrupt's trustees acquired no better title than the bankrupt had.—Crocker-Wheeler Co. v. Genesee Recreation Co., 125 N. Y. Supp. 721.

9. **Banks and Banking**—Forged Draft.—Purchaser of forged draft held not required to inquire of the drawer whether the instrument was genuine or of the drawee.—National Bank of Commerce of Lincoln v. Farmers' & Merchants' Bank, Neb., 128 N. W. 522.

10.——Liability for Erroneously Dishonoring Check.—One not a merchant or trader who sues a bank in which he is a depositor for erroneously dishonoring a check must, to recover for loss of credit, allege and prove the loss.—Western Nat. Bank v. White, Tex., 131 S. W. 828.

11.——Jurisdiction of State Courts.—A state court held to have jurisdiction to appoint a receiver for a national bank, and to require an accounting by its officers.—Grout v. First Nat. Bank, Colo., 111 Pac. 556.

12. **Beneficial Associations**—Sick Benefits.—To entitle member of beneficial association to sick benefits as against dues in arrears, held that the council of the association must have been notified of his sickness or acquired knowledge in some manner provided by its charter.—Page v. National Council Junior Order United American Mechanics, N. C., 69 S. E. 414.

13. **Bills and Notes**—Bona Fide Holders.—Where checks of a corporation, signed on its behalf by its treasurer, were made payable to a creditor of the treasurer, the transaction held to show on its face an appropriation of corporate money to the payment of an individual debt, and was bad unless shown to be good.—Johnson-Kettell Co. v. Longley Luncheon Co., Mass., 92 N. E. 1035.

14.——Burden of Proof.—One suing on a note in the possession of the maker has the burden of proving nonpayment by overcoming the presumption of payment arising from such possession.—Rock Island Plow Co. v. Balderson, S. D., 128 N. W. 482.

15.——Indorsement.—That indorsers on a note made their indorsements in consequence of unlawful inducements held out to them by the maker, for which the payee was not responsible, did not preclude the payee from recovering from the indorsers.—Ford v. Shapiro, Mass., 92 N. E. 1029.

16.——Liability of Endorser.—A verbal agreement that the indorser of a note shall not be bound held a valid defense to an action on the indorsement.—Wisig v. Beisert, Tex., 131 S. W. 810.

17.——Renewal.—The execution of a note in renewal of a previous note or debt is not a payment of the same or the creation of any new indebtedness, unless by express agreement of the parties.—Griffin v. Long, Ark., 131 S. W. 672.

18.——Time Checks.—An action on a past-due claim may be brought without any demand for payment.—Aldridge Lumber Co. v. Graves, Tex., 131 S. W. 846.

19. **Brokers**—Employment by Both Parties.—Where a real estate broker accepts employment

from both parties without the knowledge of the seller, by whom he was first employed to sell, he cannot recover commissions.—Jacobs v. Beyer, 125 N. Y. Supp. 597.

20. **Cancellation of Instruments**—Rescission.—In order to obtain rescission of a contract, plaintiff must in his petition completely disclose the entire transaction, so as to make it appear with reasonable certainty that unless relief be granted irreparable injury will result to him.—Southwestern Surety Ins. Co. of Oklahoma v. Ferguson, Tex., 131 S. W. 662.

21. **Carriers**—Action by Consignor.—Where the consignor has no interest in the goods, he will be confined to assumpsit, and cannot sue in an action ex delicto for breach of duty by the carrier.—Bennett v. Chicago, R. I. & P. Ry. Co., Mo., 131 S. W. 770.

22.——Action for Loss of Live Stock.—The person in whose name a contract to transport live stock was made is the proper party to sue thereon; ownership of the stock being immaterial.—Bennett v. Chicago, R. I. & P. Ry. Co., Mo., 131 S. W. 770.

23.——Dangers for Delay in Shipment.—The measure of damages for delay to a shipment is the difference in its market value at destination at the time it should have arrived, and at the time it actually did arrive.—Cowherd v. St. Louis & S. F. R. Co., Mo., 131 S. W. 755.

24.——Injury to Passenger Riding on Pass.—A passenger injured while riding on a free pass issued to him in violation of statute held not in pari delicto with the railroad company.—John v. Northern Pac. Ry. Co., Mont., 111 Pac. 632.

25.——Limitation of Liability.—A mere agreement for transportation between the parties to a shipment will not support an agreement to limit the carrier's common-law liability; an independent consideration such as a reduced rate being necessary.—McElvain v. St. Louis & S. F. R. Co., Mo., 131 S. W. 736.

26.——Injury to Passenger.—Where an injury to a street car passenger resulted from the concurrent negligence of the motorman and the driver of the wagon, the passenger could recover from the street railway company.—Doherty v. Boston & N. St. Ry. Co., Mass., 92 N. E. 1026.

27. **Interstate Commerce**—State Interference.—Prohibiting the sale of liquors to minors, held unconstitutional as a regulation of interstate commerce, when applied to a sale by a nonresident to a resident.—Commonwealth v. McKinney, Ky., 131 S. W. 497.

28. **Compromise and Settlement**—Consideration.—A tenant's surrender of the remainder of a term and delivering the key to the premises to the landlord held a sufficient consideration for a compromise of the landlord's claim for rent then due.—Wilke v. Weedman, Iowa, 128 N. W. 356.

29. **Constitutional Law**—Power of Legislature.—The legislature has power to formulate, and alter remedies, so its action does not impair the obligation of contracts or vested property rights.—Boggess v. Buxton, W. Va., 69 S. E. 367.

30.——Vested Cause of Action.—A vested cause of action for damages is property which cannot be taken or destroyed without due process of law.—Williams v. Atlantic Coast Line R. Co., N. C., 69 S. E. 402.

31. **Contracts**—Consideration.—A promise to assume the debt of another must be supported by a sufficient consideration.—Berkow v. Lampel, 125 N. Y. Supp. 513.

32.——Construction.—A written contract will be deemed to mean what the parties thereto intended, if such meaning can be found within the reasonable scope of its language.—Klueter v. Joseph Schlitz Brewing Co., Wis., 128 N. W. 43.

33.——Pleading.—Where a party seeks to attack as fraudulent a certificate given by his engineer or architect under a contract which in express terms makes such certificate final or conclusive, he must plead the fraud of the engineer or architect affirmatively.—Horan v. Mason, 125 N. Y. Supp. 668.

34. **Contribution**—Measure of Contribution.—One of three joint makers on a note held indebted to one of the other joint makers for a part of the debt resulting from the insolvency of the third maker.—Sailsberry v. Sailsberry, Ky., 131 S. W. 802.

35. **Corporations**—Doing Business Without License.—Failure of a foreign corporation to do business in the state, held not available to it to defeat an action on its contract.—Gaul v. Keil & Arthe Co., N. Y., 92 N. E. 1069.

36.——Rights of Stockholders.—In the absence of legislative or charter restrictions, a corporation may by action of a majority of the stockholders sell all of its property.—Cohen v. Big Stone Gap Iron Co., Va., 69 S. E. 359.

37.——Stockholders.—The creditors of a corporation seeking to enforce the liability of stockholders who have not paid for the stock issued to them held entitled only to collect so far as necessary the amount unpaid on the stock.—Stevens v. Episcopal Church History Co., 125 N. Y. Supp. 573.

38.——Termination of Charter.—Where, after the termination of a corporation's charter, it continues to do business without attempting to close its affairs, its stockholders will be regarded as partners.—Ewald Iron Co. v. Commonwealth, Ky., 131 S. W. 774.

39. **Counties**—Treasurer Liability on Bond.—County treasurer, if not negligent, held not liable on his bond for interest on public funds which he could not collect.—Hamilton County v. Cunningham, Neb., 127 N. W. 1060.

40. **Criminal Law**—Connivance to Entrap Offenders.—Connivance at an offense by one offended against to entrap and convict the offender, held not to affect the nature of the offense.—State v. Piscioneri, W. Va., 69 S. E. 375.

41.——Directed Verdict.—Accused in a criminal case is not entitled to a directed verdict.—Ryan v. State, Fla., 53 So. 448.

42.——Hypothetical Questions.—Where the facts are few and simple and already in evidence, a hypothetical question based upon them need not enumerate such facts.—People v. Wilkins, Cal., 111 Pac. 612.

43.——Presumtion of Innocence.—The presumption of innocence fixes the burden of proof in the first instance, but it does not partake of the nature of evidence.—Culpepper v State, Okl., 111 Pac. 679.

44.——Secondary Evidence.—Where a forged note executed by defendant to cover an embezzlement was claimed to have been lost, secondary evidence of its contents was not ob-

jectionable because it was a copy of a copy.—Hamer v. State, Tex., 131 S. W. 813.

45. **Damages**—Personal Injuries.—A personal injury to plaintiff from without, due to defendant's negligence, though such injury is very slight, is sufficient to justify a recovery for neurasthenic condition attributable to the mental shock or disturbance.—Driscoll v. Gaffey, Mass., 92 N. E. 1010.

46.——Theory of Reparation.—Damages for negligence are recoverable as compensation and not as punishment.—Gulf C. & S. F. Ry. Co. v. Dooley, Tex., 131 S. W. 831.

47. **Descent and Distribution**—Tenants in Common.—A tenant in common held not authorized to segregate part of the common property and appropriate the profits thereof to his own use.—Gilmore v. Gilmore, La., 53 So. 471.

48. **Dismissal and Nonsuit**—Effect on Cross Action.—Plaintiff's dismissal of his original suit has no effect on a cross-action filed by defendant.—Kolp v. Shrader, Tex., 131 S. W. 860.

49. **Divorce**—Alimony should be granted the wife by personal decree from the income of the husband or from permanent property, or both, the amount to be determined by circumstances.—Reynolds v. Reynolds, W. Va., 69 S. E. 381.

50. **Easements**—Adverse Possession. — The right to use land as a right of way may be acquired by adverse possession or prescription. —Bean v. Bean, Mich., 128 N. W. 413.

51. **Electricity**—Damage to Trees.—In the absence of statutory authority or municipal ordinance, an electric light company held liable to the owner of trees for damages accruing to his lot by reason of trimming the same.—Slabaugl v. Omaha Electric Light & Power Co., Neb., 128 N. W. 505.

52. **Embezzlement**—Where defendant had in a bank money belonging to prosecutrix to be loaned by him, different withdrawals in small sums and appropriations held not to constitute separate embezzlements, so that the fact that he only withdrew $42.25 on the date named in the indictment did not reduce the offense to a misdemeanor.—Hamer v. State, Tex., 131 S. W. 813.

53. **Estoppel**—Evidence.—Every fact essential to an estoppel in pais must be clearly proved.—Erwin v. Dekle, Fla., 53 So. 441.

54.——Innocent Parties.—Where one of two innocent parties must suffer a loss, it must be borne by the one who by his conduct rendered the injury possible.—Cohen v. Big Stone Gap Iron Co., Va., 69 S. E. 359.

55.——Persons Estopped.—Where one was estopped from relying on any infirmity in a patent to land, his heirs, on his death, were also estopped.—Howard v. Straight Creek Coal Co., Ky., 131 S. W. 804.

56. **Evidence**—Compromise.—An independent admission of a fact is admissible in evidence, though made in an effort to compromise a dispute.—Kain v. Angle, Va., 69 S. E. 355.

57. **Executors and Administrators**—Liability of Administrator.—Where a surviving husband assumes dominion over articles loaned to his deceased wife, and refuses to restore them to the lender, it creates a cause of action against him individually.—Hildreth v. Raffin, 125 N. Y. Supp. 695.

58. **Fire Insurance**—Immediate Notice.—Due diligence by insured resulting in notice to the insurer of loss under a fire policy held a compliance with a requirement of the policy that "immediate notice" of the loss be given.—Will & Baumer Co. v. Rochester German Ins. Co., 125 N. Y. Supp. 606.

59.——Title to Property.—A fire policy held void where insured without title falsely stated that he was the owner, unless insurer's agent knew as to title.—Wilson v. Germania Fire Ins. Co., Ky., 131 S. W. 785.

60. **Fixtures**—Removal.—A purchaser with notice canot take fixtures which a tenant has the right to remove, but an innocent purchaser, without notice, takes them as part of the realty.—Joslin v. Linder, S. D., 128 N. W. 500.

61. **Fraud**—Elements.—Representations of a vendor consisting of erroneously pointing out a lot as his own held not actionable, in the absence of a showing that he stated his ownership in positive terms and as of his own knowledge.—Snyder v. Stemmons, Mo., 131 S. W. 724.

62.——Misrepresentations.—One induced to purchase stock in a corporation organized to take over a business held entitled to rely on the statements of the manager of the business as to its earnings.—Diel v. Kellogg, Mich., 128 N. W. 420.

63.——Mistake.—In an action for fraudulent representations consisting of a false statement in a letter written by defendant, a subsequent letter containing a similar misrepresentation was admissible to negative inadvertence or mistake in making the representation complained of.—Steele v. Kellogg, Mich., 128 N. W. 403.

64.——Persons Liable.—The beneficiary of a fraud cannot consciously permit one to be victimized thereby and escape liability for the damages.—Spotten v. DeFreest, 125 N. Y. Supp. 497.

65.——Representations by Seller.—A purchaser must use reasonable diligence in investigating representations by the seller as to the subject-matter, and cannot recover damages caused by misrepresentations if she fails to do so.—Stone v. Pentecost, Mass., 92 N. E. 1021.

66. **Fraudulent Conveyances** — Transfer of Personalty.—The sale of personal property is not valid as against the seller's creditors unless there is a delivery within a reasonable time, and the transfer of possession is open, notorious, and continuous.—Williams v. Youtsey, Mo., 131 S. W. 705.

67. **Guaranty**—Acceptance. — An offer to guarantee debts that may be incurred by another is not binding unless notice of acceptance is given within a reasonable time, but a guaranty is binding without acceptance.—Bank of California v. Union Packing Co., Wash., 111 Pac. 573.

68. **Habeas Corpus**—Questions Reviewable.—Where it affirmatively appears that the court had jurisdiction, its judgment and proceedings canont be impeached on habeas corpus.—State v. McDonald, Minn., 128 N. W. 454.

69. **Homestead**—Exemptions.—A grandmother and grandchild held to constitute a family under the meaning of the homestead exemption.—First Nat. Bank v. Sokolski, Tex., 131 S. W. 818.

70.——Joint Deed.—The joint deed of husband and wife is essential to the conveyance of

the homestead under general circumstances.—Reyes v. Escalera, Tex., 131 S. W. 627.

71. **Homicide**—Presumptions.—On an indictment for intentionally shooting at a person with intent to kill, there is no presumption that the shooting was wrongful, from the sale fact that the weapon used was a deadly one.—Bartell v. State, Okl., 111 Pac. 669.

72.——Self-Defense.—Accused's apprehension of danger or death must have been such as any reasonable man would conceive to be imminent to justify the killing as in self-defense.—People v. Herges, Cal., 111 Pac. 624.

73. **Husband and Wife**—Agency of Husband.—In an action for injuries to a wife, while preparing meat, from a carpet tack left imbedded in the meat by the dealer, evidence held to warrant a finding that the husband, in buying the meat, was acting as agent for the wife.—Hunt v. Rhodes Bros. Co., Mass., 92 N. E. 1001.

74.——Married Women.—A married woman who is a free trader is not authorized to convey her separate real estate without joinder of her husband and execution of her conveyance, as prescribed by section 952.—Council v. Pridgen, N. C., 69 S. E. 404.

75.——Tenants in Common.—Husband and wife held to own land in common, and not by the entirety.—Isley v. Sellars, N. C., 69 S. E. 279.

76. **Insurance**—Beneficiary. — The misrepresentation of an insured in his written application for insurance that the beneficiary was his wife held to avoid the policy.—Continental Casualty Co. v. Lindsay, Va., 69 S. E. 344.

77.——Dissolution of Company.—A final decree of dissolution of an insurance company held to render it incapable of carrying out its contracts, and its policy holders are present creditors to the amount of the equitable value of their policies.—Schloss v. Metropolitan Surety Co., Iowa, 128 N. W. 384.

78. **Intoxicating Liquors**—License.—It was no answer to a proceeding to cancel a liquor license for violating the Sunday law that one of the licensees objected to the sale, and only made it after insistence by the purchasers.—Pezold Bros. v. City of Louisville, Ky., 131 S. W. 802.

79.——Parties Liable for Illegal Sale.—The agent of another illegally selling intoxicating liquors may be convicted.—State v. Brown, Mo., 131 S. W. 760.

80.——Regulation by Legislature.—The Legislature can regulate sale of liquor and revoke a license on conviction of offense against liquor law.—State v. Woodward, W. Va., 69 S. E. 385.

81. **Judgment**—Conclusiveness. — Both the record of former judgment and parol evidence is admissible to determine what was adjudicated therein.—Nunn v. Mather, Wash., 111 Pac. 566.

82. **Jury**—Demurrer to Evidence.—The sustaining of a demurrer to evidence is not a violation of the statute providing that the issues shall be tried by jury, where the evidence is conceded to be true, and all legitimate inferences therefrom are admitted.—Meade v. Meade, Va., 69 S. E. 330.

83. **Landlord and Tenant**—Covenants in Lease.—Covenant in lease to furnish heat and power for a new building referred to in the lease and later completed on a demised premise held a covenant running with the land.—Storandt v. Vogel & Binder Co., 125 N. Y. Supp. 568.

84. **Liability Insurance** — Employe's Rights Against Insurance Company.—An employe obtaining a judgment against his employer held not entitled to a decree against an insurer indemnifying the employer against loss.—Cayard v. Robertson & Hobbs, Tenn., 131 S. W. 864.

85. **Libel and Slander**—Innuendo.—Where, in slander, the petition in charging the specific slanderous words is not aided by any inducement or colloquium, there can be no recovery, unless the words are slanderous per se.—Kunz v. Hartwig, Mo., 131 S. W. 721.

86. **Limitation of Actions**—Exceptions.—If a statute of limitations contains no exemption of insane persons, no exception exists.—Collier v. Smaltz, Iowa, 128 N. W. 396.

87. **Malicious Prosecution** — Termination of Suit.—The proceedings claimed to have been maliciously prosecuted must have terminated in favor of the plaintiff in the action for malicious prosecution to enable him to maintain it.—Anderson v. Zorn, Tex., 131 S. W. 835.

88. **Master and Servant**—Burden of Proof.—One suing for a wrongful discharge from an employment calling for expert skill has the burden of proving his ability and willingness to perform his work.—Canthen v. Breyer, Tex., 131 S. W. 853.

89.——Defective Appliances.—An employer cannot escape liability for failing to furnish proper safety appliances because they might not have been effectual or might not have been used, even if at hand.—Rice v. Van Why, Colo., 111 Pac. 599.

90.——Instructions to Servant.—Where no additional instructions could have been given to a servant which would have enabled him to avoid injury, the employer was not bound to give such instructions.—Sheehan v. Goodrich, Mass, 92 N. E. 1005.

91.——Liability at Common Law.—The master at common law is liable to his employe only for the condition of those things which are directly connected with his business.—Hawkes v. Broadwalk Shoe Co., Mass., 92 N. E. 1017.

92.——Violation of Rules.—Railroad company held not liable for the death of a railroad engineer in a collision, caused by his willful violation of a rule regulating the operation of trains.—Southern Ry. Co. v. Johnson's Adm'x., Va., 69 S. E. 323.

93. **Mechanics' Liens**—Material Men.—A subcontractor furnishing materials to a contractor abandoning the work held entitled to a lien to the amount remaining after the owner completed the work within the contract price and the amount received from the surety of the contractor.—Rice v. Rhone, Colo., 111 Pac. 585.

94. **Mortgages**—Extension of Time.—Where a mortgagee, with knowledge that a sale of mortgaged premises, by an agreement with the purchaser, but without the consent of the mortgagors, extends the time for payment of the debt, the mortgagors are released to the extent of the excess value of the land.—Sime v. Lewis, Minn., 128 N. W., 468.

95.——Right to Foreclose.—Cancellation of mortgage of record, to enable mortgagee to escape taxation, held to bar right to foreclose.—Will v. Brookhart, Iowa, 128 N. W. 337.

96.——Transactions Constituting.—Where a transaction was a pledge of an interest as security for a debt, it will be construed as a mortgage, though designated and in form a deed or lease.—Cagliostro v. Galgano, 125 N. Y. Supp. 523.

97. **Municipal Corporations** — Liability for Negligence.—A town in maintaining and operating an electric plant held not engaged in a governmental function, and was therefore liable for the negligence of its agents and servants in that behalf.—Harrington v. Commissioners of Town of Wadesboro, N. C., 69 S. E. 399.

98. **Negligence**—Contributory Negligence. — It is not negligence as a matter of law to voluntarily expose one's self to a great danger to rescue another from a like peril, though such other is not a child or an infirm person, if there appears to be a fair chance of success.—Dixon v. New York, N. H. & H. R. Co., Mass., 92 N. E. 1030.

99.——Res Ipsa Loquitur.—The presumption of want of care, raised by the res ipsa loquitur doctrine, is a want of ordinary care.—John v. Northern Pac. Ry. Co., Mont., 111 Pac. 632.

100. **Parent and Child**—Right to Child's Earnings.—The right of a father to the earnings of his minor child is limited to his minority.—Gilman v. C. W. Dart Hardware Co., Mont., 111 Pac. 550.

101. **Parties**—Bringing in New Parties.—Indorsees on a note may, when sued thereon, require that the maker be brought before the

court.—Sutherland v. People's Bank, Va., 69 S. E. 341.

102.——Joint Tort Feasors.—One of a number of joint tort-feasors may be sued without joining the others.—Helberg v. Mosmer, Wis., 128 N. W. 439.

103. **Partition**—Proceedings. — In a suit for partition, where part of the tenants in common were the equitable assignees of a mortgage, it is a first lien upon the proceeds, and their equities should be adjusted by means of an accounting.—McCrum v. McCrum, 125 N. Y. Supp. 717.

104.——Rights of Purchaser at Sale. — The doctrine of caveat emptor held to apply to sales under partition decrees.—Holt v. Love, Tex., 131 S. W. 857.

105. **Partnership**—Individual Liability. — A firm debt should be paid from firm assets, and the individual property of the partners should not be proceeded against until the firm assets are exhausted.—Seligman v. Friedlander, N. Y., 92 N. E. 1047.

106.——Liability After Notice of Dissolution. —A firm which is dissolved is not liable for goods purchased by the continuing partner from a seller having notice of the dissolution.—Paxton & Gallagher Co. v. Starkweather, S. D., 128 N. W. 479.

107.——Liability for Negligence.—The liability of a partnership for negligent death is joint and several.—Rice v. Van Why, Colo., 111 Pac. 599.

108.——Undisclosed Partner. — Where one makes a contract without disclosing that he has a partner, the other, on learning the fact, may sue on the contract, either against the one making contract or the firm.—Shanley v. Merchant, 125 N. Y. Supp. 587.

109. **Payment**—Application of Money Wrongfully Obtained.—Money of a corporation, wrongfully used in the payment of a debt of an individual, held not applicable in payment of a debt of the corporation to the same creditor.—Johnson-Kettell Co. v. Longley Luncheon Co., Mass., 92 N. E. 1035.

110.——Presumptions.—The presumption of nonpayment from the possession of an uncanceled note may be rebutted.—Elliott v. Capital City State Bank, Iowa, 128 N. W. 369.

111. **Powers**—Life Estates.—A life estate may be created with power annexed authorizing the life tenant to defeat the remainder over by sale of the fee.—Hamilton v. Hamilton, Iowa, 128 N. W. 380.

112. **Principal and Agent**—Liability of Agent —While an authorized agent is not personally liable under contracts made for a known principal, he may become so by pledging his personal credit.—Jones v. Gould, N. Y., 92 N. E. 1071.

113.——Secret Limitations.—Limitations privately placed by a principal on the general authority of his agent not communicated to a third person dealing with the agent are not binding on the third person.—Browning v. McNear, Cal., 111 Pac. 541.

114. **Principal and Surety**—Consideration.—A consideration moving to the principal alone contemporaneous with or subsequent to the promise of the surety is sufficient.—Bower v. Jones, S. D., 128 N. W. 470.

115.——Liability of Surety.—A surety is not justified in relying on a mere statement from his principal that he has paid a note or satisfied his obligation.—Reints & De Buhr v. Uhlenhopp, Iowa, 128 N. W. 400.

116. **Process**—Return.—Since the presumption that the return or proof of service speaks the truth as to the time and manner of service is not conclusive, it may be amended to conform to the facts.—West Mountain Lime & Stone Co. v. Danley, Utah, 111 Pac. 647.

117. **Railroads**—Crossing Accident. — If a crossing is especially dangerous, it is incumbent on the company to exercise care commensurate with the danger.—Louisville & N. R. Co. v. Gardner's Adm'r, Ky., 131 S. W. 787.

118. **Receiving Stolen Goods**—Elements of Offense.—The statutory crime of receiving stolen property held not intended to punish the thief by way of double penalty.—Adams v. State, Fla., 53 So. 451.

119. **Replevin**—Growing Crops. — An entire crop of growing oranges, the buyer having the right to pick them from the trees, are personalty, so that replevin lies for an unlawful detention of the possession.—Simmons v. Williford, Fla., 53 So. 452.

120. **Sales**—Passing of Title.—Provisions in a sale contract that the goods, when packed, should be shipped, and the freight deducted from the price, held not to prevent title passing on delivery of the goods to the carrier.—Twitchell-Champlin Co. v. Radovsky, Mass., 92 N. E. 1038.

121.——Right to Interest.—A buyer of machinery held not entitled to avoid liability for interest on a past due claim for the price, on account of defects in the machinery.—American Hoist & Derrick Co. v. Frey, La., 53 So. 486.

122. **Specific Performance**—Mutuality. — An agreement for the sale of land held not to be specifically enforced, for lack of mutuality.—Kohart v. Boyle, 125 N. Y. Supp. 567.

123. **Statutes** — Construction. — The court must construe a remedial statute so as to suppress the injury and advance the remedy contemplated by the statute.—John v. Northern Pac. Ry. Co., Mont., 111 Pac. 632.

124. **Subscriptions**—Conditions.—In an action on a note given for a college subscription, conditional on the obtaining of subscriptions for a specified sum during the year, the burden was on plaintiff to show that the conditions had been complied with.—Wasson v. Clarendon College & University Training School, Tex., 131 S. W. 852.

125. **Taxation**—Assessment. — Complainant held not estopped to question assessments of land for taxes because of insufficiency of description.—French v. City of New Rochelle, 125 N. Y. Supp. 677.

126.——Assessment of Property.—The assessment of the property of others at a lower rate than that of the complaining taxpayer, which is not assessed above its cash value as required by law, does not render the tax invalid unless the assessment was fraudulently made.—Doty Lumber & Shingle Co. v. Lewis County, Wash., 111 Pac. 562.

127.——Assets of Expired Corporation.—Surplus assets of a corporation deposited in another state held the personal property of testator, who was the owner of all the stock of the corporation, after the corporation's charter had expired and a reasonable time had elapsed for its dissolution.—Ewald Iron Co. v. Commonwealth, Ky., 131 S. W. 774.

128.——Invalid Assessment.—A suit in equity will not lie to set aside an assessment as a cloud on title, where the defect appears on the face of the assessment role.—French v. City of New Rochelle, 125 N. Y. Supp. 677.

129.——Tax Titles.—Under the statute, one who is not the owner of property sold for taxes nor an assignee under an assignment in writing of the right to redeem has no right to redeem, and a deed from the sheriff to him passes no title.—Wilson v. Germania Fire Ins. Co., Ky., 131 S. W. 785.

130. **Trusts**—Equitable Fee.—A testator may qualify a gift of an equitable fee or of an equitable interest by provisions against alienation, and liability for debts.—Lathrop v. Merrill, Mass., 92 N. E. 1013.

131. **Usury**—Usurious Transactions.—A lender, not intending to make a usurious contract, may be paid for his trouble and expense in collecting the money for the loan.—Bennett v. Ginsberg, 125 N. Y. Supp. 650.

132. **Vendor and Purchaser**—Burden of Proof —The burden of proof is upon a purchaser of land previously sold by his grantor to a third person by unrecorded deed to prove that he purchased without notice of such deed.—McParland v. Peters, Neb., 128 N. W. 523.

133.——Contract for Warranty Deed.—Where a vendor contracted to deliver a deed with covenants of warranty, the purchaser is not bound to accept the deed of a third person, though the real owner.—Buswell v. O. W. Kerr Co., Minn., 128 N. W. 459.